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OFFICE OF ADMINISTRATIVE HEARINGS
11/6/2014 11:33 AM

STATE OF NORTH CAROLINA
COUNTY OF CHEROKEE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14EDC03526

■ BY PARENT OR GUARDIAN ■ PETITIONER, V. CHEROKEE COUNTY BOARD OF EDUCATION RESPONDENT.	FINAL DECISION
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THIS MATTER came before the undersigned Administrative Law Judge in Cherokee County on September 15-18, 2014. Oral and documentary evidence were received during the hearing. Based on the evidence submitted at the hearing, the Undersigned provides the following ORDER:

Parties and Counsel:

For the Petitioner, ■, by parent or guardian, ■
The Moncrieffe Law Firm
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107 Windel Drive
Suite 201
Raleigh, NC 27609

For the Respondent, the Cherokee County Board of Education.
Campbell Shatley, PLLC
K. Dean Shatley, II
674 Merrimon Avenue, Suite 210
Asheville, NC 28804

Witnesses for Petitioner:

1. Dr. Steven Love
2. Ms. Cynthia Brockway
3. Ms. Jessica Sheppard
4. Dr. Diane Conti
5. Ms. Brenda Phillips
6. ■. Petitioner
7. Mrs. Anne Boring
8. Ms. Ashley Smith

Witnesses for Respondent:

1. Dr. Victoria Shea
2. Ms. Leesa Gant

Based on a request by Respondent and with consent of Petitioner, the Undersigned allowed Respondent to present the testimony of Dr. Victoria Shea prior to the close of Petitioner's evidence for the convenience of the witness. Petitioner had the opportunity to thoroughly cross-examine Dr. Shea.

JURISDICTION

████ is a child with disabilities and the Office of Administrative Hearings has jurisdiction over this matter pursuant to Part 1D of Article 9 of Chapter 115C of the North Carolina General Statutes, Chapter 150B of the North Carolina General Statutes, the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300; and NC 1504-1 of the *North Carolina Policies Governing Services for Children with Disabilities*'. Neither party objected to the Office of Administrative Hearings' (OA11) jurisdiction during the hearing.

PROCEDURAL HISTORY

1. Petitioner filed for a contested case hearing on May 12, 2014 alleging, *inter alia*, Respondent denied █████. *a free appropriate public education* (or "FAPE").

2. On May 30, 2014, Respondent filed a Motion to Dismiss certain claims raised by Petitioner pursuant to Rule 12 of the North Carolina Rules of Civil Procedure. Specifically, Respondent moved to dismiss the following claims: (1) claims arising prior to May 12, 2013 as being barred by the statute of limitations; (2) claims or allegations related to the restraint or supervision of █████; (3) Petitioner's request for an independent education evaluation; and (4) Petitioner's request that Respondent be made to pay for tuition for prospective placement in a private, day school.

3. The Undersigned received memorandums of law and heard oral arguments from both Parties on Respondent's motions to dismiss in the Guilford County Courthouse, High Point, North Carolina on July 3, 2014. After reviewing the information provided by the Parties, including applicable case law, the Undersigned granted Respondent's motion to dismiss claims arising prior to the statute of limitations (more than one year prior to the filing of the Petition). The remaining motions to dismiss filed by Respondent were denied.

4. On September 2, 2014, the Undersigned entered its Second Pre-Hearing Conference Order setting the hearing for this matter on September 15, 2014.

The *North Carolina Policies and Procedures Governing Services for Children with Disabilities* will be cited as NC 1500-1. The Policies and Procedure manual was adopted by the North Carolina Department of Public Instruction and State Board of Education pursuant to authority granted by Part B of the Individuals with Disabilities Education Act 20 U.S.C. 1400 and 34 C.F.R. 300.1.

5. There was no objection by either Party regarding the timeliness or date of the hearing.

6. Prior to the start of the hearing on September 15, the Undersigned heard oral arguments on two motions; a Motion for Sanctions filed by Petitioner and Motions in Limine filed by Respondent.

7. The Undersigned denied Petitioner's Motion for Sanctions, which is set out more specifically in a separate order.

8. The Undersigned granted *in part*, and denied, *in part*, Respondent's Motions in Limine, which is set out more specifically in a separate order.

9. Prior to the hearing, the Parties filed agreed upon Stipulations with the OAH. These stipulations are attached, as Exhibit 1, and hereby incorporated into this Order by reference,

ISSUES

1. On September 2, 2014, Petitioners filed their Pre-hearing Memorandum defining the issues before the OAH, which included:

- a. Whether Respondent denied Petitioner, ■■■■, a free and appropriate education during the school year ending in June 2013,
- b. Whether Respondent denied Petitioner, ■■■■, a free and appropriate public education during the school year ending in June 2014.
- c. Whether the individualized education plan created on behalf of Petitioner, ■■■■, for the 2014-2015 school year is reasonably calculated to provide meaningful benefit to Petitioner, ■■■■?
- d. Whether the individualized education plan created on behalf of Petitioner, ■■■■, for the 2014-2015 school year is procedurally deficient?
- e. What forms of relief, both compensatory and prospective, are appropriate?

2. In its Pre-hearing Statement, filed September 8, 2014, Respondent objected to the issues raised by Petitioner that arose prior to the tolling of the one-year statute of limitations. Other than this objection, Respondent did not object to the issues raised by Petitioner.

FINDINGS OF FACTS

The Undersigned hereby makes the following findings of fact:

RELEVANT BACKGROUND

1. ■■■■ is a sixth grade student at ■■■■ Middle School, located in Cherokee County, NC, and operated by Respondent. ■■■■ is currently ■■■■ years old and his date of birth is

██████████. On the date of filing of the Petition for Contested Case Hearing ("Petition"), ██████████ was a ██████████ grade student at ██████████ Elementary School. (Stipulation, ¶ 1)

2. ██████████ is currently classified as a child with a disability of ██████████. ██████████ was first diagnosed with ██████████ in June 2005 by the Child Development Services Agency. (██████████, ██████████) While ██████████ began communicating around the age of nine (9) months, he stopped speaking when he was approximately eighteen (18) months old. (██████████)

3. Respondent has provided special education services to ██████████ since 2005, when he was just three (3) years old. (██████████; Stipulation ¶ 3)

4. According to his IEP, ██████████ verbal skills are very limited; although, he can communicate and say several words and phrases regarding his basic needs and desires. (Tr. Ex. 8)

5. In addition, ██████████ has challenging behaviors that impede his ability to learn. (K.M., pp. 367, 371)

6. Because ██████████ is a student with a disability under IDEA, Respondent has provided ██████████ with an IEP. (Tr. Ex. 8) An IEP is created by an IEP Team for each student with a disability. NC 1503-4.

7. During the 2012-2013 school year and from August to December of 2013, Ashley Smith was ██████████ primary special education teacher. (Smith, p. 483)

8. ██████████ 2013-2014 IEP was created in April 2013, more than one year before the filing of the Petition. (Stipulation ¶ 5)

9. During the fall semester of 2013, Respondent began an evaluation of ██████████ behavior. This evaluation culminated in two I.E.P. meetings in December 2013. The first meeting took place on December 2 and the second meeting took place on December 12. The purpose of these two IEP meetings was to review the behavior data, conduct the Functional Behavior Assessment, otherwise known as an "FBA", and draft an appropriate Behavior Intervention Plan, otherwise known as a "BIP." (Stipulation 11116-7)

10. These meetings were attended by several school professionals, including his teacher, Ashley Smith; the school psychologist, Courtenay Sumpter; the Exceptional Children's Director, Anne Boring; the principal of ██████████ Elementary School, Arnold Matthews; and ██████████ Ms. Phillips, the teaching assistant; Cindy Brockway, the ██████████-team facilitator, also attended the first meeting on December 2. A middle school teacher, Rachel Payne, attended the December 12 meeting as well. (Tr. Ex. 2, p. 2; ██████████; Stipulations TT 9-10)

11. Ashley Smith resigned her employment with Cherokee County Schools in December 2013. (Smith, p.503)

12. When Ashley Smith left the employment of Cherokee County Schools, Jessica Sheppard took over the intensive intervention classroom, thereby becoming ██████████ teacher.

(Sheppard, p. 246) Ms. Sheppard already taught at [REDACTED] Elementary and specifically taught in a classroom for students with behavioral problems. This was routinely called the PRC 29 classroom throughout the hearing. (Sheppard, pp. 242-4) These two classes were combined - upon Ms. Smith's resignation becoming effective. (For reference purposes, "PRC" stands for "Program Report Code," which is basically a term used within a school district's budget. "29" refers to the actual budget line item.)

13. In the combined classroom, Ms. Sheppard had only four students in her class full-time, Ms. Sheppard also had two teaching assistants. (Sheppard, pp. 328-9)

14. Respondent regularly provided training to its professional staff on best practices in working with students with [REDACTED]. (Boring, p. 435)

WITNESSES

15. At the hearing, Petitioner presented several witnesses very knowledgeable about [REDACTED], including his psychologist, his teachers, his teaching assistant, his doctor, and his mother.

16. Despite the knowledge of these witnesses, Petitioner elicited no evidence to demonstrate that [REDACTED] has been denied FAPE at any time. Each of these particular issues raised by Petitioner will be addressed separately; however, it is important to provide the background on each of these witnesses.

17. Dr. Steven Russell Love, Ph.D., is a psychologist at the Olsen Huff Center for Child Development in Asheville, North Carolina. In Dr. Love's private practice, he primarily works with children with [REDACTED], which includes conducting diagnostic evaluations and behavior interventions of children with [REDACTED], and providing support for families with children with [REDACTED]. (Love, pp. 51-2) About twenty percent (20%) of the children with [REDACTED] seen by Dr. Love are diagnosed as severely [REDACTED]. (Love, p. 53)

18. Prior to working in private practice, Dr. Love was the clinical director for the Asheville TEACCH Center in Asheville, North Carolina. ("TEACCH" is an acronym for the Treatment and Education of Autistic and Related Communication Handicapped Children.) He served in this role for eighteen years. At the TEACCH Center, Dr. Love consulted with, and trained, schools and teachers that work with students with [REDACTED]. (Love, p. 54)

19. Dr. Love has also written multiple articles regarding children with [REDACTED] and conducted many workshops and lectures on the same topic. (Love, pp. 57-9)

20. Dr. Love has seen [REDACTED] and his mother approximately five (5) times since 2012. Dr. Love counseled [REDACTED] on strategies to minimize [REDACTED] negative behaviors, (Love, pp. 75-6) Dr. Love did not observe [REDACTED] in the classroom or have any consultation with school staff regarding [REDACTED] (Love, p. 144)

21. Petitioner tendered Dr. Love as an expert witness without objection by Respondent. The Undersigned admitted Dr. Love as an expert witness. (Love, p. 64)

22. Dr. Love testified as to his written report regarding [REDACTED]. (Tr. Ex. 1) The report is dated June 23, 2014.

23. Ms. Cynthia Brockway is a special education teacher for Respondent, Ms. Brockway also testified to being friends with [REDACTED] (Brockway, p. 155)

24. Ms. Brockway teaches four students in an intensive intervention classroom. She also works with five to six students as their resource special education teacher. (Brockway, p. 155-6)

25. In addition to teaching, Ms. Brockway served on an [REDACTED] problem solving team and assistive technology team for Respondent. (Brockway, p. 155)

26. Ms. Brockway was not directly involved with the development of [REDACTED] IEP; however, she did consult with some of the professional, educators that worked with [REDACTED], including consulting with the school psychologist on the Functional Behavior Assessment; consulting with [REDACTED] speech therapist on a communication device; and consulting with [REDACTED] occupational therapist to set up individual work systems. (Brockway, pp. 161-3)

27. Ms. Brockway attended a December 2, 2013 I.E.P. meeting to review the data recently collected for a Functional Behavioral Assessment. (Brockway, p. 163) Mrs. Brockway did not attend the December 12, 2013 I.E.P. meeting in which the FBA and BIP were completed. (Brockway, p. 172) Further, Ms. Brockway did not attend any other IEP meeting held on behalf of [REDACTED]

28. Ms. Brockway had not formally observed [REDACTED] in the classroom setting prior to the hearing. (Brockway, p. 183)

29. Ms. Jessica Sheppard is a special education teacher in the intensive intervention program at [REDACTED] Elementary School. Ms. Sheppard has an undergraduate degree in special education and a master's degree in supervision and administration. (Sheppard, p. 327) She has worked in public education for thirty-two years and has also served as the Exceptional Children's Director for Cherokee County Schools. (Sheppard, pp. 327-8)

30. As a special education teacher, Ms. Sheppard designs specialized instruction for her students and provides direct instruction for the students assigned to her class. (Sheppard, pp. 241-2) Ms. Sheppard was [REDACTED] teacher from January 2014 through the end of the 2013-2104 school year. (Sheppard, p. 246)

31. Ms. Sheppard has sufficient background and training in teaching students with [REDACTED]. (Sheppard, p. 249) Ms. Sheppard is also Respondent's Behavior Specialist and routinely consults with other teachers on how to address problematic behaviors exhibited by students with disabilities. (Sheppard, p. 287)

32. Dr. Dinah Conti also testified as an expert witness. Dr. Conti is [REDACTED] pediatrician. (Conti, p. 305)

33. Ms. Brenda Phillips works as a teacher assistant and bus driver for Respondent. She worked with [REDACTED] for approximately seven (7) years while he was at [REDACTED] Elementary School. Ms. Phillips has served as a teaching assistant for Cherokee County Schools for thirty-one (31) years. (Phillips, pp. 337-8, 341)

34. Ms. Phillips assisted [REDACTED] with his classwork, IEP goals, his BIP, and transitioning from classroom to non-classroom activities, like lunch or recess. (Phillips, p. 341) Ms. Phillips spent most of her time in the classroom working directly with [REDACTED] (Phillips, pp. 341-2)

35. [REDACTED] is [REDACTED] mother. [REDACTED] is also a teacher for Respondent and teaches special education. ([REDACTED] p. 369) [REDACTED] holds a bachelor's and master's degree in special education and an educational specialist, or Ed.S., in educational leadership. [REDACTED] was also a member of Respondent's [REDACTED] Support Team and served as Respondent's [REDACTED] problem-solving facilitator. ([REDACTED] pp. 390-2)

36. Mrs. Anne Boring is the Director of the Exceptional Children's Program for Respondent. As Director, Mrs. Boring supervises special education teachers and insures IEP's are appropriate and compliant. (Boring, p. 430) Prior to becoming Director of the EC Program, Mrs. Boring taught special education. She holds a Bachelor's degree, with an add-on licensure in special education and a Master's Degree in Educational Leadership. (Boring, pp. 430-1)

37. Ms. Ashley Smith was [REDACTED] teacher during the 2012-213 school year and for most of the first half of the 2013-2014 school year. Ms. Smith has a Bachelor's degree in physical education with an add-on licensure for special education through the North Carolina Department of Public Instruction. While [REDACTED] teacher, Ms. Smith was a licensed special education teacher in the state of North Carolina.

38. Ms. Smith resigned her position with Respondent in December 2013 and now works as a teacher in Fannin County, Georgia. (Smith, pp. 480-1, 503) Prior to teaching special education, Ms. Smith ran a daycare for disabled children, many of which were [REDACTED]. (Smith, p. 481)

39. Ms. Leesa Gant is [REDACTED] current teacher for the 2014-2015 school year. (Gant, p. 547) Ms. Gant has a Bachelor's degree in Sociology and Psychology. She also has a Master's degree in special education. Ms. Gant has completed postgraduate work in several areas related to education, including visual impairment, mentally handicapped, elementary education, birth through kindergarten, and reading. (Gant, p. 543) Ms. Gant is licensed by DPI to teach special education. (Gant, pp. 543-4)

40. Ms. Gant also holds certification in Applied Behavior Therapy and is considered a TEACCH master teacher. (Gant, pp. 544-5)

41. Dr. Victoria Shea holds a Ph.D. in clinical psychology and is a licensed psychologist in the State of North Carolina. A substantial amount of Dr. Shea's practice focuses on children with autism. Dr. Shea also has worked with TEACCH programs throughout North Carolina for most of her career. (Shea, pp. 193-6) Dr. Shea has written and taught extensively on best practices in working with students with autism. (Shea, pp. 195-7)

42. Dr. Shea reviewed relevant portions of N.M.'s educational file and observed [REDACTED] in Ms. Gant's classroom.

43. Respondent tendered Dr. Shea as an expert witness without objection by Petitioner. The Undersigned admitted Dr. Shea as an expert witness. (Shea, p. 210)

FAPE DURING THE 2013-2014 SCHOOL YEAR

44. Prior to addressing the specific issues, it is necessary to provide a little background on [REDACTED],

45. Dr. Love testified that [REDACTED] is a neurological-based developmental disability currently within the *Diagnostic and Statistical Manual of Mental Disorders, 5th Ed.* ("DSM-V"). According to Dr. Love, [REDACTED] causes "impairments in social interaction, communication with others, a preference for sameness and heightened sensory experience that can co-occur with the intellectual disability, with language impairment and other neurological-based conditions as well." (Love, p. 68)

46. Dr. Shea provided similar background on autism as well, indicating there are two basic areas of impairment for a child with [REDACTED]: (1) social communication and social relationships; and (2) restricted and repetitive behaviors, activities and interests. (Shea, p. 202)

47. Both Dr. Love and Dr. Shea have worked extensively with North Carolina TEACCH programs. The TEACCH program espouses the technique or methodology of "structured teaching." (Shea, p. 204) While it is not necessary to provide a complete explanation of structured teaching, it is important to note that structured teaching uses an individualized approach to every student, uses visual supports and strategies for students, and also calls for the structuring (or organizing) of time and the area in which the student works. (Shea, pp. 203-4)

48. Ms. Smith was [REDACTED] teacher from August through December 2013 during the 2013-2104 school year. Ms. Smith competently testified that the April 2013 IEP was implemented while she was [REDACTED] teacher. (Smith, p. 509)

49. Ms. Smith used positive behavioral interventions and several of the interventions later outlined in the December 2013 BIP, including using his mat as a place to calm down, utilizing a sensory diet and implementing rewards for positive behaviors. (Smith, p. 485) Ms. Smith also directed and supervised the manner and methods in which Ms. Phillips taught [REDACTED] (Smith, pp. 510-11)

50. In the fall of 2013, [REDACTED] did exhibit behavioral issues, including the hitting and kicking of people or objects. (Smith, pp. 484-5) Some of these hits are for sensory purposes and not an act of aggression. ([REDACTED] p.409)

51. During the fall semester of 2013, the IEP team began to evaluate [REDACTED] behavior. This evaluation culminated in a FBA being conducted at an IEP meeting on December 2 and December 12. As a result, the team developed a BIP at the December 12, 2013 meeting. (Stipulations ¶¶ 6-7)

52. This process began on September 17, when an IEP meeting was held to gain the necessary permission from [REDACTED] to conduct an evaluation. ([REDACTED] pp. 405-7; Tr. Ex. 14)

53. During the December 2 meeting, the school psychologist presented data and information on [REDACTED] behavior in the school setting. (Boring, p. 437)

54. The IEP team adjourned the first day of the meeting to collect more specific behavior data at the request of Cindy Brockway. ([REDACTED] p. 381) The team ultimately reviewed the additional data at the December 12 meeting.

55. In his report, Dr. Love indicated the FBA was sufficient. (Love, p. 140; Tr. Ex. 1)

56. Petitioner did not submit the FBA as a trial exhibit.

57. Shortly after the December meeting, Ms. Smith resigned her position and [REDACTED] classroom was assigned to Ms. Jessica Sheppard. (Smith, p. 503)

58. The BIP was to start on January 6, 2014, the first of school after winter break. (Tr. Ex. 2) Because of snowy weather, school did not start until January 8. ([REDACTED] p. 385)

59. Prior to starting as [REDACTED] teacher, Ms. Sheppard reviewed [REDACTED] IEP and BIP. Further, Ms. Sheppard began implementing [REDACTED] BIP the first week of school in January. In addition, to prepare for [REDACTED] in her classroom, Ms. Sheppard observed [REDACTED] for a week and consulted with Ms. Brenda Phillips, a teaching assistant that worked with [REDACTED] for several years. (Sheppard, pp. 266-7)

60. Ms. Sheppard also consulted with the school psychologist who had just conducted [REDACTED] Functional Behavior Assessment. The school psychologist provided input on the BIP, including the process of implementing the plan and providing appropriate sensory stimulation and rewards for [REDACTED] (Sheppard, p. 267-8; Tr. Ex. 2)

61. Ms. Sheppard indicated that [REDACTED] did not have a difficult time transitioning to her being his teacher. (Sheppard, p. 331)

62. When [REDACTED] exhibited problem behaviors he was redirected to his mat, which was used as a type of "time-out" area, in accordance with his BIP. (Sheppard, p. 269-70; Phillips, p. 348)

63. Further, Ms. Sheppard maintained daily notes in order to comply with the BIP's data collection requirement. (Sheppard, p. 273-4).

64. Furthermore, based on the testimony of Petitioner's expert witness, Dr. Love, the BIP created in December 2013 provides sufficient interventions for [REDACTED]. Dr. Love only had minimal concerns over the BIP. One of these concerns was ensuring there is delineation between the physical location where [REDACTED] takes a break from work and where he is sent to calm down or for a "time-out" (i.e. his mat). (Love, p. 141)

65. Ms. Sheppard testified, however, that [REDACTED] was not sent to his mat when he requested to take a break; rather he was provided a chair to sit in when he wanted to take a break. Based on Ms. Sheppard's testimony, this should alleviate Dr. Love's first concern over the BIP. Further, the BIP entered into evidence by Petitioner also indicates this same delineation. (Tr. Ex. 2; Love, p. 142)

66. The only other concern with the BIP listed by Dr. Love was Section 5 of the BIP, which indicates [REDACTED] will "communicate verbally regarding work, foods, emotions and pain." (Tr. Ex. 2; Love, p. 142) Dr. Love indicated that more visual supports should be used if [REDACTED] cannot adequately communicate regarding these areas. (Love, p. 142) Other than this concern, Dr. Love indicated the BIP addressed the behaviors of concern. (Love, p. 142)

67. Ms. Sheppard also testified that combining the students in her previous PRC 29 classroom with the students in the intensive intervention classroom did not have a negative impact on [REDACTED] behavior. (Sheppard, p. 329) Further, while in Ms. Sheppard's classroom, Ms. Phillips was almost always with [REDACTED] to assist him in his work and behavior. (Sheppard, p. 330)

68. Ms. Sheppard also testified that, to her knowledge, the "activities" teachers (e.g. music, art, etc.) were not provided a copy of the BIP. There was no evidence presented that the failure of the activity teachers to have a copy of the BIP impacted [REDACTED] education. To the contrary, the evidence indicated that [REDACTED] education was not affected at all because the teacher assistant, Ms. Phillips, accompanied [REDACTED] to all activity classes. Ms. Phillips was aware of the BIP and its implementation. In the activity classes, Ms. Phillips provided visual and verbal support, including the regular use of his "break card", (Sheppard, pp. 274-277, 281, 330) Further, [REDACTED] would only spend forty-five minutes a day in an activity class. (Sheppard, p. 330)

69. In his report and testimony, Dr. Love stated other concerns with [REDACTED] education during the 2013-2014 school year; primarily that the "break card" addressed in the BIP was not implemented in a timely manner (Love, p. 138; Tr. Ex. 1, p. 4) The "break card" is a manner in which [REDACTED] would communicate his need or desire to take a break from his work. However, both Ms. Sheppard and Ms. Phillips testified that the "break card" was used at the beginning of the spring 2014 semester. Ms. Phillips also testified that [REDACTED] was provided training on how to use the "break card" and that the "break card" went with [REDACTED] when he went to different areas of the school for lunch or activity classes. (Phillips, pp. 358-9)

70. Dr. Love's other concern was whether or not the new teacher, Ms. Sheppard, received the BIP in a timely manner. (Tr. 1, p. 5; Love p. 144) Ms. Sheppard testified that she did in fact review the BIP prior to [REDACTED], starting in her class in January 2014. This testimony was disputed by [REDACTED] testimony and evidence, which alluded to the fact that Ms. Sheppard may not have received the BIP until January 15, 2014. (Tr. Ex. 15, p. 2) Even if [REDACTED] assertions are accurate, there would have only been a few days in which Ms. Sheppard taught [REDACTED] before reviewing the BIP.

71. During her testimony, [REDACTED] indicated that she believed the BIP was not effective in addressing [REDACTED] behavior, ([REDACTED] p. 392) Ms. Sheppard, however, did indicate that [REDACTED] behaviors did improve through the use of the BIP. (Sheppard, p. 333)

72. Dr. Shea also testified that the interventions listed in the BIP (Tr. Ex. 2) were sufficient for [REDACTED] (Shea, p. 234)

73. During the course of the spring 2014 semester, [REDACTED] BIP and IEP were implemented by Ms. Sheppard and Ms. Phillips with fidelity.

74. Ms. Sheppard also regularly consulted with [REDACTED], regarding the BIP and IEP. At one point, [REDACTED] asked that Ms. Sheppard stop using photograph cards for [REDACTED] picture schedule and use a specific brand of cards called Boardmaker. The Boardmaker cards could be used in a communication device that [REDACTED] received. Ms. Sheppard obliged this request.

75. The Petitioner also raised an issue of whether [REDACTED] received a bruise while in Ms. Sheppard's class. Ms. Sheppard indicated she was unaware of how [REDACTED] received a bruise but that it may have happened when he and Ms. Phillips got tangled up in his coat and fell to the ground. (Sheppard, pp. 285-6)

76. Ms. Sheppard testified that while she was [REDACTED] teacher, [REDACTED] was never restrained by school staff. (Sheppard, p. 284)

77. Ms. Sheppard testified that the interventions contained in the BIP helped [REDACTED] in that it gave consistency for the consequences. (Sheppard, p. 333)

78. I find the testimony of and evidence presented by Ms. Sheppard to be credible and based on her professional experience, that her opinions are reliable.

79. The 2013 IEP was implemented appropriately. Further, the 2013 BIP provides sufficient interventions for [REDACTED] and was implemented appropriately.

FAPE AND THE APRIL 2014 INDIVIDUAL EDUCATION PLAN

80. During his testimony, Dr. Love presented no evidence or testimony that the April 2014 IEP or BIP failed to provide [REDACTED] with meaningful educational benefit. In fact, prior to his testimony, Dr. Love had not even reviewed the April 2014 IEP or BIP. His report was written

June 23, 2014, more than two months after the April 2014 IEP and revised BIP were drafted and implemented. (Tr. Ex. 1)

81. Since Dr. Love failed to adequately review the newest IEP, it is extremely difficult for the Undersigned to find, through the testimony of Dr. Love, that the April 2014 IEP and BIP denied [REDACTED] a free and appropriate education.

82. Dr. Love did not review the revised April 2014 BIP either. However, the December and April BIP's are very similar and Dr. Love did indicate that the interventions in the December 2013 BIP were adequate. (Love, p. 141; Tr. Ex. 7)

83. Dr. Love did indicate, however, that [REDACTED] needs a highly structured and organized classroom environment. (Love, p. 149; Tr. Ex. 1, p. 5) Dr. Shea did not disagree with this premise and also opined that [REDACTED] needs assistance in developing his receptive understanding and his expressive use of communication; and to become more independent in following visual and written schedules. (Shea, p. 206)

84. Dr. Love also made a series of six recommendations. (Tr. Ex. 1, pp. 4-5) These recommendations included: (i) the adoption of a three-tiered school-wide positive behavior support system; (ii) an evaluation of [REDACTED] by a board certified behavior analyst; (iii) providing an appropriate communication system for [REDACTED]; (iv) utilizing a special education advocate; (v) utilizing the Asheville TEACCH center to set up a highly structured classroom; and (vi) the development of a care team for [REDACTED] (Tr. Ex. 1, pp. 4-5)

85. Dr. Shea did agree with some of Dr. Love's recommendations, specifically the recommendation for an evaluation and providing an appropriate communication system. (Shea, pp. 213-4) Dr. Shea indicated that she had no opinion on the recommendation regarding the utilization of a special education advocate since that would be a family matter. Dr. Shea also indicated she did not see how Dr. Love could make school based recommendations, specifically the recommendation for a school-wide behavior program and the recommendation of a care team when he only saw [REDACTED] in the clinical setting. (Shea, pp. 213-4)

86. In order to appropriately address the 2014-2015 IEP created in April 2014, it is important to review how the IEP was developed. [REDACTED] IEP team met on two days in April 2014 in a facilitated I.E.P. meeting. The meeting was facilitated by a facilitator appointed by the North Carolina Department of Public Instruction ("DPI"). (Stipulations ¶ 11) During this two-day meeting, both Parties were represented by counsel. ([REDACTED], pp. 413-4)

87. [REDACTED] actively participated in the April IEP meeting. (Boring, p. 441)

88. At the conclusion of the April 2014 IEP meeting, the Team developed an I.E.P. that would be in place from April 21, 2014 through April 20, 2105. The Team also revised [REDACTED] Behavior Intervention Plan. (Stipulation ¶¶ 8-9; Tr. Ex. 8)

89. The April 2014 IEP was entered into evidence as Trial Exhibit 8. The April 2014 revised, B.I.P. was entered into evidence as Trial Exhibit 7.

90. Prior to the meeting, Ms. Sheppard met with [REDACTED] to provide information about [REDACTED] current academic and behavioral progress. This included information on [REDACTED] daily work and behaviors in school. (Sheppard, p. 260) This meeting took place around the first week of April 2014. The meeting was an informal meeting used primarily to review the 2013-2014 IEP, to receive input from [REDACTED], and to discuss what the new IEP would contain, (Sheppard, pp. 331, 335; [REDACTED], p. 415) Ms. Sheppard also provided information to the IEP team at the April 2014 meetings that [REDACTED] was making some progress on his I.E.P. goals. (Sheppard, p. 263)

91. Notes regarding [REDACTED] behaviors and work were sent home on a daily basis. At the meeting held on April 2, [REDACTED] told Ms. Sheppard that she did not know why these notes were sent home on a daily basis because she did not have time to review them, (Sheppard, pp. 261-3)

92. Further, at the April 2 meeting, [REDACTED], provided input and suggestions about the draft IEP. Ms. Sheppard incorporated [REDACTED] suggestions into the IEP. (Sheppard, p. 331)

93. After the April 2014 IEP meeting, Ms. Sheppard began collecting specific behavior frequency data. (Sheppard, p. 272)

94. Based on the actions of Respondent, many of the relevant recommendations have been followed or are in the process of being implemented. In the spring of 2014, Respondent contracted with an [REDACTED] consultant from DPI to observe [REDACTED], in the classroom setting. (Boring, p. 443) Respondent also signed a contract with the Asheville TEACCH office to provide support to [REDACTED] teacher. Respondent also requested that a DPI board certified behavior analyst to observe and provide recommendations regarding [REDACTED]. (Boring, pp. 442-3)

95. In addition, [REDACTED] has a new teacher, Ms. Leesa Gant for the 2014-2015 school year. Ms. Gant has certifications in Applied Behavior Analysis and is specifically trained in the TEACCH methodology of structured teaching (Boring, p. 445; Gant, pp. 544-5)

96. Before the 2014-2105 school year began, Ms. Gant reviewed [REDACTED] IEP and BIP. (Gant, p. 547)

97. Ms. Gant set up a specific workstation for [REDACTED] using TEACCH' s method of structured teaching. (Gant, p. 547)

98. At the time of the hearing, [REDACTED] had only been in Ms. Gant's class eleven (11) days during the 2014-2015 school year. Further, when [REDACTED] has come to school, he has not stayed a full day. (Gant, p. 548)

99. Ms. Gant has implemented [REDACTED] IEP and BIP. [REDACTED] is provided all of the interventions outlined in his BIP. (Gant, pp. 548-51, 553)

100. Ms. Gant has implemented a highly structured environment using the TEACCH method commonly referred to as structured teaching. (Gant, pp. 548-51)

101. According to Ms. Gant, when [REDACTED] demonstrates agitation he quickly becomes calmed down by engaging in the activities and interventions outlined in his BIP. (Gant, pp. 5523)

102. Between Ms. Gant and her assistant, Ms. Cathy Kope, [REDACTED] also receives a significant amount of one-on-one assistance while in school. (Gant, p. 553)

103. According to Ms. Gant, [REDACTED] is doing well in her class and is making progress. (Gant, pp. 548-50, 555) [REDACTED] has increased his verbal functioning and increased his interest in other students. (Gant, p. 551)

104. The Undersigned finds Ms. Gant's testimony to be credible and reliable, and based on her professional experience, that her opinions are reliable.

105. Further, Dr. Shea interviewed Ms. Gant and observed her classroom. Dr. Shea indicated that [REDACTED] new classroom is highly structured and organized and has the necessary visual supports for [REDACTED] (Shea, pp. 208-11)

106. Dr. Shea opined that Ms. Gant's classroom is a sound educational environment for [REDACTED] (Shea, p. 212) Dr. Shea also opined that Ms. Gant is a highly experienced teacher that understands autism and teaching students with [REDACTED]. (Shea, p. 212)

107. Dr. Shea's opinions about [REDACTED], as well as her testimony about Ms. Gant and Ms. Gant's classroom are credible and reliable.

108. Ms. Gant has implemented the April 2014 IEP and BIP appropriately; the 2014 IEP and BIP do provide [REDACTED] with FAPE and are reasonably calculated to provide meaningful educational benefit.

PROCEDURAL DEFICIENCY IN THE 2014 IEP

109. Petitioner presented documentary evidence, as Exhibit 18, a document entitled "Invitation-Request to Excuse/Prior Notice." This document indicated that [REDACTED] did not agree to excuse a required team member who can interpret evaluation results from the April IEP meeting. This document was signed by [REDACTED] on April 21 or 27, 2014. The Undersigned finds the date on the document to be somewhat illegible; however, the second day of the April 2014 IEP meeting did occur on April 21.

110. Petitioner, however, presented no evidence as to how this failure on the part of Respondent impeded [REDACTED] right to FAPE, impacted [REDACTED] ability to participate in the decision-making process, or otherwise created a deprivation of educational benefit.

PRIVATE SCHOOL PLACEMENT

111. As part of her request for relief, [REDACTED] asked the OAH to consider placing [REDACTED] in a private day school setting at Respondent's expense. (Petition p. 23, 1(158; [REDACTED] p. 393)

112. To be clear, [REDACTED] currently remains enrolled in Respondent's school. Petitioner does not request reimbursement for a private school or program which [REDACTED] now attends. As of the date of the hearing, [REDACTED] had not withdrawn [REDACTED] from school and had not enrolled him in a private placement. Rather, she is asking the OAH to prospectively place [REDACTED] in a private day school based on the theory that Respondent had not provided FAPE.

113. In particular, [REDACTED] specifically asked the Undersigned to place [REDACTED] at a school in [REDACTED] North Carolina, called the [REDACTED] School. ([REDACTED], pp. 393-4) [REDACTED] did visit the school and applied for [REDACTED] to attend. The [REDACTED] School did indicate that it would admit [REDACTED]. ([REDACTED] p. 394; Tr. Ex, 13)

114. Dr. Love indicated he believes [REDACTED] would be beneficial for [REDACTED]; however, Dr. Love did little to no research on the school. He did not visit the school, discuss [REDACTED] with the school's staff, or ask colleagues about the school. The only research Dr. Love did was to review the school's website. Although Dr. Love was a qualified expert witness for [REDACTED], the paucity of information on this school was troubling to the Undersigned.

115. At the April 21, 2014 IEP meeting, [REDACTED] could not recall whether she asked the team to place [REDACTED] at the [REDACTED] School. ([REDACTED], p. 414) Mrs., Boring testified that [REDACTED] did not make this request. (Boring, p. 441)

116. The [REDACTED] School emphasizes the Applied Behavioral Analysis methodology of working with students with [REDACTED] ("ABA"). Dr. Shea testified that the ABA and structured teaching methodologies have a lot in common and that the classroom developed by Ms. Gant is sufficient to provide [REDACTED] with an appropriate education. (Shea, pp. 205, 214)

117. Even if the Undersigned finds that Respondent failed to provide FAPE, which the Undersigned does not find, Petitioner has presented no evidence that the [REDACTED] School would be able to provide an appropriate education for [REDACTED]

CONCLUSIONS OF LAW

Therefore, based on the findings above, the Undersigned makes the following conclusions:

1. [REDACTED] is a student with a disability and is entitled to the due process protections of the Individuals with Disabilities Education Act, codified at 29 U.S.C. 1400 and Article 9 of N.C.G.S. Ch. 115C.

2. The Respondent Board of Education is responsible to provide a free and appropriate education for all students eligible under the Individuals with Disabilities Act, including [REDACTED]

3. In *Schaffer v. Weast*, 546 U.S. 49 (2005), the United State Supreme Court ruled that the burden of proof in a special education administrative proceeding falls upon challenging

or petitioning party. Therefore, it is up to Petitioner to present evidence that Respondent has not provided [REDACTED] with a *Free and Appropriate Public Education*.

4. "In all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary," N.C.G.S. §115C-44(b).

5. IDEA and the corresponding regulations and state policies do not require a school to conduct a functional behavioral assessment or implement a behavior intervention plan except when a student is recommended for a long term suspension. *See* NC 1504-2.1(c). However, the law does require the IEP Team to consider "the use of positive behavioral interventions and supports, and other strategies" to address behaviors that impede the child's learning. NC 1503-5.1(a)(2)(i).

6. While Respondent was under no legal obligation to conduct a FBA or implement a BIP, it did so and therefore met the requirements set forth in NC 1503-5.1(a)(2)(i).

7. The April 2013 IEP was implemented appropriately. Furthermore, the December 2013 BIP was tailored to provide appropriate interventions for [REDACTED]. The BIP was implemented appropriately during the remainder of the 2013-2104 school year while it was in effect. Therefore, Petitioner has failed to carry the burden of proof as to this issue.

8. There was no evidence provided during the hearing that Respondent failed to meet its legal obligations to provide a free and appropriate education to [REDACTED]. The 2014-2015 IEP, including the revised BIP, was tailored to provide [REDACTED] with FAPE in the Least Restrictive Environment in compliance with state and federal law. Therefore, Petitioner has failed to carry the burden of proof as to this issue.

9. Reviewing courts should be reluctant to second-guess the judgment of education professionals. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 206 (1982). Appropriate IEPs should not be disturbed due to a disagreement with content or methodology and courts should defer to the educators' decisions. *Id.* at 207.

10. A court should not substitute its notions of sound educational policy for that of local school officials. *Hartmann v. Loudoun Co. Bd. of Ed.* 118 F.3d 996 (4th Cir. 1997) *cert. denied*, 522 U.S. 1046 (1988). The methodology to be employed by a school system in educating a child eligible under IDEA is within the sole province of the school system's professional educators and is free from judicial interference. *Hendrick Hudson Dist. Bd of Ed. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *Hartmann*, 118 F,3d 996 (4th Cir. 1997); *Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991).

11. North Carolina's standard for education does not mean that the school system must provide the "best" program or a "utopian" program. Instead, the standard means that the IEP must ensure that the child has an opportunity to reach their full potential commensurate with the opportunity given other children. *Burke Co. Bd. of Ed. v. Denton*, 895 F.2d 973 (4th Cir. 1990). Thus, disabled students in North Carolina are not entitled to a "utopian" program any

more than regular education students. *Harrell v. Wilson Co. Schs.*, 58 N.C. App. 260 (1982) *cert. denied*, 450 N.C. 1012 (1983). According to the North Carolina Supreme Court, all students are entitled to the opportunity of a sound basic education. *Leandro v. State of North Carolina*, 346 N.C. 336 (1997).

12. Once a school system offers a Free and Appropriate Public Education, it has no obligation to provide or reimburse parents for their unilateral choice of education or therapy. See *Hendrick Hudson Dist. Bd of Ed, v. Rowley*, 458 U.S. 176 (1982); *Burke Co. Bd, of Ed v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Tice v. Botetourt Co. Sch. Bd.*, 908 F.2d 1200 (4th Cir. 1990); *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997).

13. The change from Ms. Smith's classroom to Ms. Sheppard's class was not a change in placement under IDEA in that [REDACTED] continued to be in a "separate setting" away from non-disabled peers for a majority of his school day.

14. In matters alleging a procedural violation of IDEA, the Court may rule that such procedure violation results in a denial of FAPE in three circumstances: when the procedural deficiency (i) impeded the child's right to FAPE; (ii) significantly impacted the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (iii) caused a deprivation of education benefit. NC 1504-1.14(a)(2).

15. Assuming the omission of a particular team member from the April 2014 IEP meeting was a procedural violation of IDEA, the omission did not impede [REDACTED] right to FAPE, significantly impede [REDACTED] ability to participate in the decision-making process, or caused a deprivation of educational benefit. Therefore, Petitioner has failed to carry the burden of proof as to this issue.

16. The Undersigned further orders that a prospective, private placement is not legally necessary or appropriate in this matter. Petitioner has failed to prove any violation of the minor Petitioner's rights for which relief can be granted. Moreover, Petitioner failed to prove that prospective, private educational placement is legally necessary or appropriate.

17. Petitioner is to be commended for seeking the best education possible for her son, However, Respondent provided FAPE in the least restrictive environment and no more is required,

DIRECTED VERDICT ORDER

1. At the close of Petitioner's evidence, Respondent moved for Directed Verdict pursuant to Rule 53 of the North Carolina Rules of Civil Procedure, Both parties were given the opportunity to orally address the motion.

2. The Motion for Directed Verdict parallels the issues set forth by Petitioner in her Pre-hearing Statement, particularly:

- a. Whether Respondent denied Petitioner [REDACTED], a free and appropriate education during the school year ending in June 2013.
- b. Whether Respondent denied Petitioner, [REDACTED], a free and appropriate public education during the school year ending in June 2014.
- c. Whether the individualized education plan created on behalf of Petitioner, [REDACTED], for the 2014-2015 school year is reasonably calculated to provide meaningful benefit to Petitioner, [REDACTED].
Whether the individualized education plan created on behalf of Petitioner, [REDACTED], for the 2014-2015 school year is procedurally deficient.
- e. What forms of relief, both compensatory and prospective, are appropriate.

3. Based on the evidence presented at the hearing as well as arguments made by both parties, the Undersigned granted Respondent's motion in part, and denied its motion, in part, and made the following ruling:

- a. The OAH does not have specific jurisdiction over Petitioner's first issue (whether FAPE was provided prior to one year before the filing of the Petition) because it is outside of the statute of limitations, and therefore Respondent's motion is granted, as a matter of law, in regards to this issue.
- b. The OAH does not have jurisdiction over whether the April 2013 IEP provided a free and appropriate public education to [REDACTED] since the IEP was implemented more than one year prior to the filing of the Petition. Therefore, the issue of the April 2013 IEP is beyond the statute of limitations. Petitioner failed to present any other evidence that Respondent denied [REDACTED] a free and appropriate education during the school year ending in June 2014 and therefore, Respondent's motion is granted in regards to this issue.
- c. The remaining portions of Respondent's Motion for Directed Verdict were denied.

FINAL DECISION

In regards to the remaining issues, the Undersigned orders the following:

- 1. Petitioner has failed to carry her burden of proving that [REDACTED] was denied a free and appropriate public education.
- 2. Petitioner is not entitled to any relief.
- 3. This matter is dismissed in its entirety, with prejudice.
- 4. Petitioner shall be responsible for costs of this action as provided by law.

5, The Undersigned does believe [REDACTED] would benefit from a new evaluation and Respondent has agreed to conduct an evaluation to implement any relevant recommendations from the evaluation deemed appropriate or necessary by the IEP Team, including whether or not a one-on-one assistant is needed.

NOW THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the grounds stated in Petitioner's Petition for a Contested Case Hearing have not been proven by a preponderance of the evidence, and the Undersigned finds in favor of the Respondent Board of Education.

NOTICE

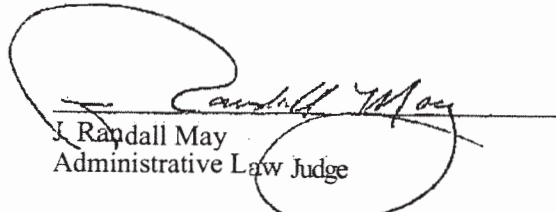
In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights regarding this Final Decision.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 or G.S. 115C-109.8 may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices. The State Board, through the Exceptional Children Division, shall appoint a Review Officer from a pool of review officers approved by the State Board of Education. The Review Officer shall conduct an impartial review of the findings and decision appealed under this section."

Inquiries regarding further notices, time lines, and other particulars should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina prior to the required filing period.

IT IS SO ORDERED,

This the 6th day of November, 2014,


J. Randall May
Administrative Law Judge